

1 MICHAEL BAILEY
United States Attorney
2 District of Arizona
BEVERLY K. ANDERSON
3 Assistant U.S. Attorney
Arizona State Bar No. 010547
4 United States Courthouse
405 W. Congress Street, Suite 4800
5 Tucson, Arizona 85701
Telephone: 520-620-7300
6 Email: bev.anderson@usdoj.gov
Attorneys for Plaintiff
7

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 United States of America,
11 Plaintiff,
12 vs.
13 Joshua Joel Pratchard,
14 Defendant.
15

CR 18-01256-TUC-CKJ (JR)

GOVERNMENT'S RESPONSE TO
DEFENDANT'S OBJECTIONS TO
PRESENTENCE REPORT

16 Plaintiff, the United States of America, by and through its undersigned counsel,
17 hereby responds to Defendant's Objections to the Presentence Report, as set forth in the
18 attached Memorandum of Points and Authorities.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 On June 2, 2019, the United States Probation Office issued a Draft Presentence
21 Report ("PSR") (Doc. 66). The PSR set the base offense level at 26, under U.S.S.G.
22 § 2K2.1, concluding that the instant offense was committed subsequent to sustaining at
23 least two (2) felony convictions of either a "controlled substance offense" or a "crime of
24 violence". Defendant objects to the guideline calculations and claims "[T]he PSR wrongly
25 asserts that defendant has two (2) prior convictions that are qualifying convictions under
26 the guidelines." (Brief at pg. 1). The Government agrees with the conclusion set forth in ¶
27 28 of the PSR that Defendant's 2002 conviction for Wrongful Distribution and Use of
28 Ecstasy is a "controlled substance offense" under U.S.S.G. § 2K2.1; however disagrees

1 with the conclusion that Defendant's 2009 conviction for Assault Resulting in Serious
2 Bodily Injury meets the definition of "crime of violence" in the Ninth Circuit.

3 Defendant was arrested on June 1, 2018, on charges stemming from a six (6) month
4 investigation involving the Defendant who traveled on several occasions from San Diego,
5 California, to Southern Arizona to participate in militia group operations with AZ Border
6 Recon (AZBR). The investigation began on January 30, 2018, when a Federal Bureau of
7 Investigation confidential human source (CHS) contacted agents to inform them about the
8 Defendant. The CHS noted that Pratchard arrived for the militia group operations with a
9 short barreled-rifle, a silencer and other prohibited items. According to the CHS, Pratchard
10 became angry when Tim Foley, the leader of AZBR, explained their standard operating
11 procedures and rules of engagement when encountering illegal aliens or illegal narcotics.
12 The Defendant wanted to go "hands on" with illegal aliens, which was contrary to the rules
13 of the organization, and he argued with Foley on how to conduct patrols. Foley was
14 concerned about the Defendant and prohibited him from engaging in future operations the
15 AZBR.

16 The CHS reported that Pratchard admitted he was manufacturing his own firearms,
17 silencers and ammunition in his home in San Diego. Agents ran a criminal history check
18 and learned that the Defendant is a prohibited possessor. Records revealed that the
19 Defendant had two (2) prior convictions, both of which were punishable by imprisonment
20 for a term exceeding one (1) year. Records revealed Defendant was convicted under the
21 Uniform Code of Military Justice in 2002 of multiple counts or specifications of Wrongful
22 Use and Distribution of Ecstasy; plus he was convicted in 2009 of Assault Resulting in
23 Serious Bodily Injury.

24 Defendant was arrested on June 1, 2018, and indicted on four (4) counts of
25 Possession of a Firearm by Convicted Felon and two (2) counts of Transferring a Firearm
26 to an Out-of-State Resident. Six (6) of the eight (8) firearms that are the subject of this
27 case were submitted to the Bureau of Alcohol, Tobacco, Firearms, and Explosives Firearms
28 Technology Criminal Branch for examination and testing. ATF concluded that of the six

1 (6) items sent to them for analysis, two (2) of the firearms were short-barreled rifles, one
2 (1) was considered “any other weapon”, two (2) of the items were silencers (also
3 considered firearms) and one (1) was a standard rifle. The total count was six (6) firearms,
4 five (5) of which were in violation of Title 26 U.S.C. § 5845(a).

5 On November 1, 2018, a Superseding Indictment was returned which charged the
6 Defendant with four (4) counts of Possession of a Firearm by a Convicted Felon, in
7 violation of 18 U.S.C. § 922(g)(1); two (2) counts of Transferring a Firearm to an Out-of-
8 State Resident, in violation of 18 U.S.C. §§ 922(a)(5) and 924(a)(1)(D); four (4) counts of
9 Possession of Unregistered Firearm, in violation of 26 U.S.C. §§ 5841, 5861(e), 5812,
10 and 5871; two (2) counts of Transfer of Firearm in Violation of NFA, in violation of 26
11 U.S.C. §§ 5861 (e), 5812, 5871; one (1) count of Possession of Body Armor by Violent
12 Felon, in violation of 18 U.S.C. §§ 931(a) and 924(7), plus a forfeiture allegation.

13 A total of eight (8) firearms, five (5) of which are Title 26 firearms, and 1,464 rounds
14 of ammunition are included within the Indictment.

15 **1. The Defendant’s 2002 Court-Martial Conviction is a Controlled Substance**
16 **Offense.**

17 The Defendant entered the Marine Corps on August 10, 1999, and on April 4, 2002,
18 he pleaded guilty at a general court-martial to one (1) specification or count involving the
19 wrongful use of 4-Methylenedioxymethamphetamine (Ecstasy), a Schedule I controlled
20 substance, and three (3) specifications or counts involving the wrongful distribution of 4-
21 Methylenedioxymethamphetamine (Ecstasy), a Schedule I controlled substance, all in
22 violation of Article 112a of the Uniform Code of Military Justice. (Exhibit 1-Conviction
23 Documents.) The Defendant was sentenced to three (3) years of confinement, with six (6)
24 months suspended, and a bad conduct discharge. *Id.* The conviction and sentence were
25 affirmed on appeal on May 18, 2004. The Defendant was released from confinement and
26 placed on parole on April 15, 2003. His parole began on April 15, 2003, and ended on
27 April 5, 2004. The distribution convictions are qualifying controlled substance offenses
28 under U.S.S.G. §4B1.2.

1 In determining whether a prior conviction qualifies as a “controlled substance
2 offense”, the categorical approach established by the Supreme Court in *Taylor v. United*
3 *States*, 495 U.S. at 602, 110 S. Ct. 2143, 109 L. Ed 607 (1990) is used. *See United States*
4 *v. Corona-Sanchez*, 291 F.3d 1201, 1203 1212-13 (9th Cir. 2002) (en banc). Under *Taylor*,
5 courts cannot examine the underlying facts of the prior offense, but “look only to the fact
6 of conviction and the statutory definition of the prior offense.” *Id.* at 1203 (quoting *Taylor*,
7 495 U.S. at 602, 110 S. Ct. 2143). Therefore, under the categorical approach, we must first
8 look to the statute of conviction to determine if the offense would qualify as a “controlled-
9 substance offense” for § 4B1.2 purposes. If the statute of conviction at issue is overbroad,
10 that is, it applies to conduct that both falls within and outside the federal definition, then a
11 conviction under the statute will not qualify.

12 The United States Sentencing Guidelines define a “controlled substance offense” as
13 an offense under federal or state law, punishable by imprisonment for a term exceeding
14 one (1) year, that prohibits the manufacture, import, export, distribution, or dispensing of
15 a controlled substance (or a counterfeit substance) or the possession of a controlled
16 substance (or counterfeit substance) with intent to manufacture, import, export, distribute,
17 or dispense. U.S.S.G. §4B1.2(b).

18 Article 112a of the Uniform Code of Military Justice makes it a crime for service
19 members to, among other things, “wrongfully” use, possess, manufacture, or distribute
20 controlled substances. The punishments for use and distribution are different. The
21 maximum punishment for the distribution of Ecstasy is fifteen (15) years of confinement,
22 whereas the maximum punishment for the use of ecstasy is five (5) years of confinement.
23 *See Manual for Courts-Martial United States*, ¶37.f.(3) (2000 edition). (Exhibit 2.) Under
24 the categorical approach, if statutory alternatives carry different punishments, they must be
25 elements, and the statute is divisible. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016).

26 The elements of the offense under Article 112a of the Uniform Code of Military
27 Justice for the *wrongful distribution of a controlled substance* are: (1) the defendant
28 distributed a certain amount of a controlled substance, and (2) the distribution by the

1 defendant was wrongful. According to the Manual for Courts-Martial:

2 To be punishable under Article 112a, possession, use, distribution,
3 introduction, or manufacture of a controlled substance must be wrongful.
4 Possession, use, distribution, introduction, or manufacture of a controlled
5 substance is wrongful if *it is without legal justification or authorization*.
6 Possession, distribution, introduction, or manufacture of a controlled
7 substance is not wrongful if such act or acts are: (A) done pursuant to
8 legitimate law enforcement activities (for example, an informant who
9 receives drugs as part of an undercover operation is not in wrongful
10 possession); (B) done by authorized personnel in the performance of medical
11 duties; or (C) *without knowledge of the contraband nature of the substance*
(for example, a person who possesses cocaine, but actually believes it to be
sugar, is not guilty of wrongful possession of cocaine).

(Emphasis Added).

12 “Distribute” means to deliver to the possession of another. “Deliver” means
13 the actual, constructive, or attempted transfer of an item, whether or not there
14 exists an agency relationship.

15 Manual for Courts-Martial, ¶37.c.(3) and (4) (2000 edition). Thus, the offense
16 requires knowing distribution.

17 In comparing the language of the U.S.S.G. §4B1.2 and the Manual for Courts-
18 Martial, it is readily apparent that the full range of conduct contemplated by the Manual
19 for Courts-Martial regarding the distribution of controlled substances falls precisely within
20 the conduct defined in U.S.S.G. §4B1.2. The defendant’s conviction is thus a controlled
21 substance offense, and Defendant’s objection should be overruled.

22 **2. Defendant’s felony conviction for Assault Resulting in Serious Bodily**
23 **Injury does not qualify as a crime of violence under current Ninth Circuit**
24 **law, despite the fact that Defendant’s conduct was intentional.**

25 On October 13, 2007, the Defendant was arrested by United States Park Police for
26 assaulting another individual on federal property at the Oktoberfest celebration at the
27 Pavilion located in Fort Mason, near San Francisco, California. The victim was rendered
28 unconscious and was lying in a pool of his own blood before being transported to the

1 hospital. A witness was able to capture part of the assault on video, which according to
2 court records, shows the Defendant repeatedly stomping on the head of an unconscious
3 man before he is pulled away by bystanders. According to court records, the victim and
4 his friend had been walking through the pavilion at Fort Mason when they were mistaken
5 for another party and assaulted. Among other things, at the hands (or more appropriately
6 foot) of Defendant, the victim suffered a broken nose, broken jaw, a concussion, bruises
7 on his chest, neck and head, pain, swelling, depression, reduced sense of smell, chronic
8 headaches and was left with Pratchard's foot print on his head.

9 On August 19, 2008, the Defendant was indicted in United States District Court for
10 the Northern District of California on one (1) count of Assault Resulting in Serious Bodily
11 Injury, in violation of 18 U.S.C. § 113(a)(6). On July 8, 2009, the Defendant pleaded
12 guilty, without the benefit of a plea agreement, to the Indictment. The Defendant was
13 sentenced to three (3) years of probation, community confinement for twelve (12) months,
14 ordered to pay a special assessment of \$100, ordered to attend drug and alcohol treatment,
15 mental health treatment, and was ordered to pay restitution to the victim in the amount of
16 \$19,516. Despite the fact that Pratchard's actions were factually a crime of violence, the
17 prevailing law in the Ninth Circuit requires a different outcome.

18 Under current Ninth Circuit law, Defendant's prior conviction for Assault Resulting
19 in Serious Bodily Injury does not meet the definition of a crime of violence because the
20 offense can be committed recklessly. For purposes of the record, the Government does not
21 concede that the holding in *United States v. Orona*, 923 F.3d 1197 (9th Cir. 2019) is proper,
22 however it remains the law in the Ninth Circuit.

23 **3. Conclusion.**

24 Defendant's 2002 conviction for Distribution of Ecstasy clearly meets the definition
25 of a Controlled Substance Offense. In comparing the language of the U.S.S.G. §4B1.2 and
26 the Manual for Courts-Martial, it is readily apparent that the full range of conduct
27 contemplated by the Manual for Courts-Martial regarding the distribution of controlled
28 substances falls precisely within the conduct defined in U.S.S.G. §4B1.2. The defendant's

1 conviction is thus a controlled substance offense, and Defendant's objection should be
2 overruled.

3 Although Defendant's prior conviction for Assault Resulting in Serious Bodily
4 Injury, in violation of 18 U.S.C. § 113(a)(6) does not meet the definition of "crime of
5 violence" in the Ninth Circuit, at least two (2) other circuits have held that it does. Despite
6 the law in the Ninth Circuit, Defendant's actions were factually a crime of violence.

7 The Government reserves the right to file a supplemental pleading at a later date.

8 Respectfully submitted this 1st day of July, 2019.

9
10 MICHAEL BAILEY
United States Attorney
District of Arizona

11
12 *s/Beverly K. Anderson*

13 BEVERLY K. ANDERSON
14 Assistant U.S. Attorney

15
16 Copy of the foregoing served electronically or by
other means this 1st day of July, 2019 to:

17 Dan Cooper, Esq.
18 Laura Udall, Esq.
Counsel for Defendant Pratchard
19
20
21
22
23
24
25
26
27
28